BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CALIXTO A. GUZMAN Claimant	)	
VS.	)	Docket No. 1,022,233
DOLD FOODS, LLC Self-Insured Respondent	)	

ORDER

Respondent requested review of the October 24, 2008 Award for Docket No. 1,022,233 a claim for injuries to claimant's bilateral upper extremities, including the shoulders, rendered by Administrative Law Judge (ALJ) John D. Clark.[1] The Board heard oral argument on January 16, 2009 in Wichita, Kansas.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Douglas Johnson, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

Except for the claimant's December 6, 2006 deposition, the Board has considered the record and adopted the stipulations listed in the Award. At oral argument, both parties agreed that if the Award was to be modified, that the Board could make the appropriate modifications thereby avoiding the need for a remand to the ALJ. The parties also agreed

[1] This appeal was taken in connection with a companion Award, Docket No. 1,022,154. Both claims were tried at the same time, but separate Awards were issued.

that claimant's permanent impairment ratings for the bilateral carpal tunnel was 10 percent to each arm.[2]

ISSUES

At the conclusion of the presentation of the evidence, the ALJ found that the claimant suffered injury to both arms and shoulders as a result of his work-related accident. Citing *Casco*[3] and making no further comment, the ALJ adopted the bilateral shoulder ratings offered by Dr. Eyster, the treating physician, as well as the undisputed bilateral carpal tunnel impairment of 10 percent to each upper extremity and assigned four separate scheduled impairments to each extremity.

The respondent requests review of this Award arguing that the ALJ's method of calculation is in error. Respondent maintains the appropriate method of calculation is to combine each of the upper extremity ratings at the shoulder level and issue two separate awards, rather than four.

Claimant contends that the Award should be modified but only to reflect an additional 10 percent impairment to claimant's right shoulder. Otherwise, claimant has no objection to the ALJ's method of calculation. Claimant does not request a permanent total disability under K.S.A. 44-510c.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute as to the compensability of claimant's accidental injury. Instead, the only apparent dispute to be dealt with in this appeal is the nature and extent of claimant's resulting impairment and the methodology of computing the resulting compensation that is due.

The parties agree that claimant sustained a bilateral carpal tunnel injury that resulted in a 10 percent permanent partial impairment to both arms. Likewise, there is no dispute that claimant sustained an injury to both his right and left shoulders. Claimant underwent treatment with Dr. Eyster who ordered an MRI of his right shoulder when conservative treatment failed to alleviate claimant's complaints of pain. The MRI revealed

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[2] The parties did not limit this to the level of the forearms nor did they obtain an impairment rating that converted the upper extremity ratings to the forearm ratings.

[3] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

a possible rotator cuff tear, and on January 6, 2006, claimant had surgery. During surgery Dr. Eyster found no tear but he did find some bony changes that required him to shave off a portion of the distal clavical. He "cleaned up" the rotator cuff and claimant was told to avoid using that arm for a period of time.

Dr. Eyster rated claimant's permanent impairment at 12 percent to the right shoulder and 6 percent to the left. When discussing his ratings at his deposition, Dr. Eyster explained that with a distal clavical resection, the *Guides*[4] automatically assign a 10 percent impairment. Dr. Eyster explained that only the right shoulder had been operated on and that the left shoulder only had a loss in the range of motion. And according to Dr. Eyster, that is why he assigned the 6 percent, as that represented an impairment proportionally less than in the right shoulder. Claimant's counsel suggested that in addition to the 12 percent impairment for the right shoulder that *another* 10 percent should have been assigned for the distal clavical resection. Dr. Eyster seemed to agree.[5] But respondent pointed out that Dr. Eyster assigned 12 percent to the right shoulder, a figure that exceeds the minimum 10 percent due for the resection procedure, thereby taking into account both the resection procedure and the additional impairment to the shoulder due to loss of range of motion.

Dr. Stein rated claimant's shoulder impairments at 5 percent to the right shoulder and an 8 percent to the left while Dr. Murati assigned a 16 percent to the right shoulder and a 7 percent to the left.

None of the physicians were asked whether claimant was permanently and totally disabled. In fact, at oral argument neither party had even considered that issue. Moreover, there is no suggestion within the ALJ's Award that permanent total disability was considered. The ALJ awarded claimant 12 percent to the right shoulder, 6 percent to the left shoulder and 10 percent each to arm. He then referenced *Casco* and concluded that each impairment rating would be separately calculated and awarded. Indeed, this is the methodology that has been employed by the majority of the Board.[6] But neither the ALJ nor the parties considered *Casco* in its entirety. And that is troublesome, particularly in this case as it involves not only *bilateral* carpal tunnel complaints, but *bilateral* shoulder complaints.

In *Casco*, the Kansas Supreme Court had occasion to consider the appropriate method for calculating bilateral injuries, an issue that up until that point, had been well

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[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[5] Eyster Depo. at 21. This is the testimony that claimant uses to base his claim that the Award should be increased to reflect a total of 22 percent to the right shoulder.

[6] *Redd v. Kansas Truck Center*, No. 1,020,892, 2008 WL 4149955 (Kan. WCAB. Aug. 27, 2008).

settled. Until *Casco,* bilateral or parallel injuries that resulted in permanent impairment were computed as a whole body impairment. But the *Casco* Court concluded that the long-standing analysis was wrong. And from that point forward the analysis for bilateral injuries was refocused. The *Casco* Court stated:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> **When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510(c)(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.**[7]

For whatever reason, neither the parties nor the ALJ considered the *Casco* analysis with respect to claimant's bilateral injuries. It seems as though permanent total disability was never even discussed and that it was a foregone conclusion that claimant's impairments were limited to separately scheduled awards.

Based on the evidence contained within the file, claimant has met the criteria to establish a prima facie case of permanent total disability under K.S.A. 44-510c. Both of his arms have suffered permanent impairment. And under the *Casco* analysis, this gives rise to the presumption of permanent total disability.

Arguably, the parties ought to be bound by their counsel's failure to fully address the issues present in this case. But doing so creates a significant issue for the Board. If that is done and the claimant's recovery is limited to separately scheduled injuries (regardless of the method of calculating the compensation due) then the intent of the Act and the analysis set forth by our Supreme Court has been thwarted. This approach would require the Board to ignore the provisions of a statute. But if we employ the *Casco* analysis, then we have unilaterally brought up an issue that had not been contemplated by either party or the ALJ. The unfairness of that is most particularly borne by respondent, who might have offered evidence in an attempt to rebut the presumption imposed by the statute. And we have no indication in this record as to what the ALJ's position would have been on that issue.

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[7] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

In light of these concerns, a majority of the Board finds that *in the interests of justice*[8], the Award in this matter should be set aside and remanded to the ALJ who is directed to reopen the record and allow respondent the opportunity to fully consider and address the implications of K.S.A. 44-510c and *Casco*.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated October 24, 2008, is set aside and this matter is remanded for further proceedings consistent with the Board's Order as set forth above.

IT IS SO ORDERED.

Dated this _____ day of February 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Emporia, Kansas, Attorney for Claimant
Douglas Johnson, Wichita, Kansas, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge

[8] *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).